DR CHE ABDUL DAIM HJ ZAINUDDIN & ORS
v. SURUHANJAYA PENCEGAHAN
RASUAH MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID WAN SALLEH J
[JUDICIAL REVIEW NO: WA-25-8-01-2024]
27 MARCH 2024

Abstract – *An exercise of function relating to criminal investigation by a Government agency, ie, the Malaysian Anti-Corruption Commission, can be challenged via a judicial review application. However, the applicant of such application must successfully establish that the investigation conducted by the Government agency is tainted with mala fide or in bad faith. Mere allegation of harassment or intimidation, or suspicion that the Government agency's investigation is tainted with mala fide, without more, does not satisfy the said requirement.*

ADMINISTRATIVE LAW: *Judicial review – Application for leave – Application against investigation conducted by Malaysian Anti-Corruption Commission ('MACC') – Whether amenable to judicial review – Whether mala fide successfully established on part of MACC – Whether investigation commenced on offence allegedly committed more than 20 years ago proper – Whether issue of mala fide ought to be tried in criminal trial – Whether amended reliefs sought, for orders of certiorari to quash charges, tantamount to collateral attack – Whether application ought to be dismissed*

CRIMINAL LAW: *Corruption – Investigation – Malaysian Anti-Corruption Commission ('MACC') commenced investigation against former Minister of Finance and his family after revelation of offshore companies, also referred as 'tax havens', related to them – Application for leave for judicial review against investigative powers of MACC – Whether amenable to judicial review – Whether mala fide successfully established on part of MACC*

The first applicant was the former Malaysian Minister of Finance and Treasurer of United Malays National Organisation (UMNO). The second and third to sixth applicants, respectively, were the wife and children of the first applicant. The seventh applicant was the registered proprietor of an asset relating to the first to sixth applicants, Ilham Tower, which was located in Jalan Binjai, Kuala Lumpur. The first and second putative respondents, respectively, were the Malaysian Anti-Corruption Commission ('MACC') and the Public Prosecutor ('PP'). In 2011, the International Consortium of Investigative Journalists (ICIJ) revealed to the media outlets, including those in Malaysia, confidential files ('Pandora Papers') which pertained to offshore companies. The Pandora Papers revealed that some of the offshore companies belonged to the first to sixth applicants. This prompted the

MACC, while contending that there was a reasonable cause to believe that an offence for gratification under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act'), had been committed by the first applicant and his family, to commence an investigation against the same. There were six notices under s. 36(1)(a) of the MACC Act and one notice under s. 44(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 which respectively, requiring the first to sixth applicants to furnish to the MACC information regarding their assets and sources of income and freezing the same's personal bank accounts and bank accounts of their companies, that were issued to the first to sixth applicants. After the first to sixth applicants complied with the said notices, and submitted their respective statements to MACC, MACC seized the Ilham Tower. Subsequently, a notice under s. 38(1) of the MACC Act was issued by MACC ordering the inspection and search of the Ilham Tower and seizure of, *inter alia*, books and records within it. There were two other notices pursuant to s. 30(1)(b) of the MACC Act that were issued to the seventh respondent's consultant for maintenance requiring the production of the following documents: (i) documents relating to the construction of Ilham Tower; (ii) the source of funds for the construction of the Ilham Tower; (iii) the 2009 to 2021 general ledger and audited financial statements; (iv) the 2022 audited reports and bank account statements of the seventh respondent, Ilham Baru and Yayasan Ilham; and (v) the loan agreement with Public Bank Bhd in relation to the construction of the Ilham Tower. Other than these, notices were also issued to other parties relating to the applicants and, the first applicant's residence was also attended by MACC where various documents were seized from therein without a detailed index list being provided to the first applicant. Aggrieved with the MACC's manner in carrying out the investigation and its continuous 'harassment' towards the first applicant and his family, the applicants filed the present application for leave of judicial review ('application'). The judicial review sought by the applicants were: (i) a declaration that the MACC and its officers had no reasonable cause to investigate the first to sixth applicants; and (ii) an order of *mandamus* to compel MACC to return all the seized documents. Nonetheless, after the first and second applicants were charged at the Kuala Lumpur Sessions Court for an offence under s. 36(2) of the MACC Act for wilfully submitting a sworn statement that did not comply with the terms of s. 36(1)(b) of the MACC Act, the applicants sought to amend their application. In the amended application, the applicants prayed for the additional reliefs of orders of *certiorari* to quash the charges made against the first and second applicants. Therefore, among the issues that arose were: (i) whether the exercise of function relating to criminal investigation by MACC amenable to judicial review; and (ii) whether the applicants successfully established *mala fide* on part of MACC in conducting the investigation.

Held (dismissing application):

(1) One way to challenge the investigative powers was to establish *mala fide* and bad faith on the part of the investigation officers. One must start with the connotation that that the decisions made by the investigation officers were cloaked with the presumption of legality. A compelling *prima facie* evidence must be established to challenge such decisions in a judicial review proceeding. From the first applicant's affidavit in support, save for the assertion that he was perplexed and deeply disturbed with the conduct of the MACC, there was no allegation or even evidence, let alone compelling, to suggest any *mala fide* on the part of any of the investigation officers of the MACC in the conduct of the investigation against the applicants. The allegation of harassment, without more, does not amount to *mala fide*. In addition, mere suspicion or even an allegation of intimidation, was insufficient. Although it might perhaps be open for the applicants to suggest that the circumstances surrounding the issuance of notices, the seizures of documents or even the freezing of the accounts might possibly relate to some suspicion of *mala fide*, however, this could not be taken for granted or considered as sufficient proof by itself. (paras 61, 64 & 66)

(2) An allegation that the notices issued by the MACC were unlawful, *per se*, was insufficient to establish *mala fide*. Whether or not the issuance of notices was unlawful was a mooting point. It was a matter of interpretation. There was respectable authority to the effect that the adoption of a different interpretation of law does not amount to an error of law on the face of the record and was therefore not a basis for judicial review. (para 67)

(3) As to whether it was proper to commence an investigation on an allegation of an offence that occurred more than 20 years ago, the maxim *nullum tempus occurrit regis* applied. The maxim meant that time does not run against the Crown. In other words, the defence of the alleged offence was stale, so to speak, unknown to our criminal law. The contention that an offence was 'stale' could only be argued as an extenuating circumstance during plea in mitigation upon conviction. In any event, even if the Anti-Corruption Act 1997 was repealed by the MACC Act, there is a saving clause in s. 74(3) of the MACC Act. As such, the argument that the investigation against the applicants offended art. 7(1) of the Federal Constitution on the protection against retrospective criminal laws was not applicable. (paras 68 & 69)

(4) The issue of *mala fide* was a question of fact which had to be proved by evidence at trial. Therefore, the allegation that the investigation against the applicants was politically motivated or that the first applicant was considered as a political foe by the current Prime Minister, ought to be addressed by the first applicant at a criminal trial. (paras 70-72)

(5) The amended reliefs sought by the applicants were arguments that centred on substantive criminal process. By attempting to quash the charges against them *via* the present application, the first and second applicants were mounting a collateral attack. This court was a judicial review court, hence, it should exercise great caution in allowing the collateral challenge. Nevertheless, considering that the first and second applicants had already been charged at the Sessions Court, it was open for them to challenge the same through a criminal application instead of a judicial review. (paras 74-76)

(6) The applicants failed to establish *mala fide*, hence, the application must fail. The general position that the exercise of function in relation to criminal investigation is not amenable to judicial review prevails. The application was therefore refused with no order as to costs. (paras 78-81)

Case(s) referred to:

City Growth Sdn Bhd & Anor v. The Government Of Malaysia [2005] 7 CLJ 422 HC ***(refd)***

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 5 CLJ 167 FC ***(refd)***

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor [2018] Supp MLJ 16 FC ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Mohd Rafizi Ramli v. PP [2014] 4 CLJ 1 CA ***(refd)***

Ong Lock Mui v. Deputy Public Prosecutor [1971] CLJU 97; [1971] 1 LNS 97 HC ***(refd)***

PP v. Dato' Sri Mohd Najib Hj Abd Razak [2019] 6 CLJ 561 FC ***(refd)***

PP v. Mark Koding [1982] CLJU 96; [1982] 1 LNS 96 HC ***(refd)***

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***

Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor [2017] 10 CLJ 1 FC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 HC ***(refd)***

Vakil Prasad Singh v. State Of Bihar [2009] INSC 156 SC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Yeap Hock Seng v. Minister For Home Affairs, Malaysia & Ors [1975] CLJU 207; [1975] 1 LNS 207 ***(refd)***

Legislation referred to:

Anti-Money Laundering Act 2001 (repealed), s. 50(1)

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 4(1), 44(1)

Banking and Financial Institutions Act 1989 (repealed), s. 97(1)

Criminal Procedure Code, ss. 5, 376(1)

Federal Constitution, arts. 5(1), 7(1), 145(3)

Malaysian Anti-Corruption Commission Act 2009, ss. 23(1), 29(4), 30(1)(a), (b), 31(1)(a), 33(1), 36(1)(a), (b), (2), 38(1), 74(3)

Rules of Court 2012, O. 53 r. 3(2)
Rules of the High Court 1980, O. 53 r. 3

Indian Constitution [Ind], art. 21

For the applicant - Tommy Thomas, Mervyn Lai Wei Shiung, Rahayu Mumazaini, Alicia Gomez & Wong Ying Ying (PDK); M/s Tommy Thomas
For the respondent - Shamsul Bolhassan & Liew Horng Bin; SFCs & Nurul Muhaimin Mohd Azman; FC

Reported by Syamim Ariffin

JUDGMENT

Wan Ahmad Farid Wan Salleh J:

The Parties

[1] The first applicant is a practising advocate and solicitor and former Minister of Finance. He was also the treasurer of UMNO from 1984 until his resignation in 2001.

[2] The second applicant is the first applicant's wife. The third to sixth applicants are the first applicant's children.

[3] The seventh applicant, Ilham Tower Sdn Bhd, is the registered proprietor of "Ilham Tower". Ilham Tower is the subject matter of a notice of seizure issued pursuant to s. 38(1) of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act").

[4] The putative first respondent is the Malaysian Anti-Corruption Commission, a statutory body established under the MACC Act. The putative second respondent is the Public Prosecutor. Under s. 376(1) of the Criminal Procedure Code ("CPC"), the Attorney General shall be the Public Prosecutor and shall have control and direction of all criminal prosecutions and proceedings under the Code.

The Factual Background

[5] It is the first applicant's case that prior to joining politics and holding public office, he was a "fairly successful and wealthy businessman". According to the applicant, he had controlling or substantial interests in many public listed companies, which include various premier banks. His 10% stake in Nestle Malaysia alone is worth approximately RM3 billion.

[6] In short, before he joined politics, the first applicant always owned assets and properties locally and overseas since the 1970s through what he referred to as "legitimate business activities".

The Anatomy Of The Pandora Papers

[7] In 2021, an organisation known as the International Consortium of Investigative Journalists ("ICIJ") provided to the media outlets, including those in Malaysia, access to leaked confidential files. The confidential files revealed the owners of offshore companies in the jurisdiction, which may be referred to as "tax havens".

[8] The worldwide release became known as the "Pandora Papers".

[9] The offshore companies and assets listed in the Pandora Papers were also linked to the first applicant, his wife and children.

[10] This is how it all began.

[11] On 12 February 2023, the MACC sought, and the first applicant gave a statement. Nothing happened immediately after that. It was only on 7 June 2023 that notices, pursuant to s. 36(1)(a) of the MACC Act, were issued to the first to sixth applicants requiring information regarding their assets and sources of income. The MACC also sought information on the assets sent out from Malaysia from 1997 to date.

[12] Section 36(1)(a) provides as follows:

> Notwithstanding any written law or rule of law to the contrary, an officer of the Commission of the rank of Commissioner and above, if he has reasonable ground to believe, based on the investigation carried out by an officer of the Commission, that any property is held or acquired by any person as a result of or in connection with an offence under this Act, may by written notice:
>
> (a) require that person to furnish a statement in writing on oath or affirmation.

[13] Paragraph 2 of the notices states that the information required is to be furnished within 30 days:

> Pernyataan bersumpah atau berikrar yang tersebut di atas hendaklah diserahkan sendiri atau dengan pos berdaftar kepada saya di alamat yang tersebut di atas dalam tempoh **30 hari** dari tarikh penyampaian NOTIS ini kepada kamu. (emphasis added)

[14] According to the notices, the Chief Commissioner of the MACC ("the Chief Commissioner") had reasonable cause to believe that an offence for gratification under s. 23 of the MACC Act was committed based on investigations regarding a complaint referred to as No: IPJ/RPTMO: 0145/2023 ("complaint"). Section 23(1) of the MACC Act provides that any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

[15] On the same day, 7 June 2023, the Chief Commissioner had caused the MACC to issue to the first and sixth applicants notices pursuant to s. 44(1) of the Anti-Money Laundering, Anti-Terrorism Financing and

Proceeds of Unlawful Activities Act 2001 ("AMLA"). Section 44(1) of the AMLA, *inter alia,* provides that an enforcement agency, in this case, the MACC, may issue an order to freeze any property of any person, wherever the property may be, if an investigation with regard to an unlawful authority has commenced against that person and the enforcement agency has reasonable grounds to suspect that the property is the proceeds of an unlawful activity or the instrumentalities of an offence.

[16] As a result of the notices under s. 44(1) of the AMLA, the first to sixth applicants' personal bank accounts and the bank accounts of their companies were frozen.

[17] The first applicant's personal assistant was also served with a notice dated 7 June 2023 pursuant to s. 30(1)(b) of the MACC Act requiring her to produce the first applicant's personal office planner and visitor logbook from 2013 to date.

[18] On 3 July 2023, the applicants were served with a second s. 36(1)(a) notices.

[19] The applicants, through their solicitors, had requested from the Chief Commissioner for them to be given an extension of time regarding compliance with the second s. 36(1)(a) notices. The solicitors also intimated to the Chief Commissioner if they could be given the opportunity to make appropriate representations to the MACC regarding the allegations that were hitherto unbeknownst to the applicants.

[20] While the Chief Commissioner acceded to the request for an extension of time, he refused to disclose the nature of the complaint on the basis that the complaint was still in the midst of being investigated. In para. 3 of his letter to the solicitors dated 4 August 2023, the Chief Commissioner states as follows:

> Berhubung dengan perenggan 3(c) surat tuan, untuk makluman Notis di bawah Seksyen 36(1)(a) Akta SPRM 2009 adalah diperuntukan di bawah Bahagian V Akta SPRM 2009 yang memberi kuasa kepada pegawai SPRM untuk menjalankan siasatan. Oleh itu, tiada keperluan untuk pihak SPRM mendedahkan butiran dalam aduan yang sedang dalam proses siasatan.

[21] Subsequently, the applicants were further served with the third and fourth notices under s. 36(1)(a) of the MACC Act.

[22] Unperturbed, the first applicant, through his solicitors, again sought for the Chief Commissioner to reconsider his request that he be furnished with the allegations made in the complaint. The Chief Commissioner turned down the request on the ground that under s. 29(4) of the MACC Act, the report shall be kept secret and shall not be disclosed by any person to any person other than officers of the Commission and the Public Prosecutor until an accused person has been charged in court.

[23] The first to the sixth applicants were subsequently served with the fifth and sixth notices under s. 36(1)(a) dated 6 October 2023 and 8 November 2023, respectively.

[24] In view of the persistent refusal of the Chief Commissioner and MACC to accede to their request to make the representations on the complaint, the applicants were left with no choice but to comply with s. 36(1)(a) notices. Accordingly, on 13 December 2023, the first to sixth applicants' solicitors submitted to the MACC their respective statements pursuant to s. 36(1)(a) and (b) of the MACC Act.

Ilham Tower And Yayasan Ilham

[25] Ilham Tower is a 60-storey building at No. 8 Jalan Binjai, Kuala Lumpur, located on the piece of land known as Geran No. 75830 Lot No. 20002 Seksyen 63 ("Ilham Tower land").

[26] As alluded to earlier, Ilham Tower is managed and owned by Ilham Tower Sdn Bhd, the seventh applicant herein.

[27] There is another related entity, known as Yayasan Ilham, which is a non-profit company established for charity, including the promotion of arts, culture and education in Malaysia. Yayasan Ilham's current Board of Directors includes the second, fifth and sixth applicants, who are also its subscribers.

[28] By notices dated 18 December 2023 issued pursuant to s. 30(1)(b) of the MACC Act and directed to one Harliza binti Harun of Shareworks Sdn Bhd ("Shareworks"). Shareworks is a company secretarial firm for Ilham Baru Sdn Bhd ("Ilham Baru"), Ilham Tower Sdn Bhd and Yayasan Ilham. Section 30(1)(b) provides that an officer of MACC investigating an offence under the section may:

> (b) order any person, to produce before him, within the time specified by such officer, any book, document, records, accounts or computerized data, or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence.

[29] The notices under s. 30(1)(b) of the MACC Act required Harliza and Shareworks to produce four types of documents, the details of which are minutes books, secretarial files, annual returns and financial statements of "Ilham Group of Companies" from 2015 to 2023. The first applicant, however, insisted that no such group exists.

[30] A further notice of search and seizure dated 18 December 2023 was issued under s. 31(1) of the MACC Act, ordering, *inter alia,* the entering, finding and seizing of books, documents and inspection of persons at Shareworks' office. Section 31(1) empowers the Public Prosecutor or an

officer of MACC with the rank of Chief Senior Assistant Commissioner if there is reasonable cause to suspect that, in any place, there is evidence of the commission of an offence under the MACC Act.

[31] It was also on the same day that the MACC seized Ilham Tower pursuant to a notice issued under s. 38(1) of the MACC Act. Section 38(1) provides that where the Public Prosecutor is satisfied on information given to him by an officer of the MACC that any immovable property is the subject matter of an offence under the MACC Act or evidence of the commission of such offence, such property shall be liable to seizure.

[32] In addition to the notice under s. 38(1), the MACC issued a further notice under s. 31(1) of the MACC Act dated 18 December 2023, ordering the inspection and search of Ilham Tower and seizure of, *inter alia,* books and records within it. There were two notices issued by the MACC pursuant to s. 30(1)(b) of the MACC Act to one Ooi Buk Soon, a consultant for maintenance in Ilham Tower Sdn Bhd. The notices required that the MACC be provided, *inter alia,* the following:

(i) documents relating to the construction of Ilham Tower;

(ii) the source of funds for the construction of Ilham Tower;

(iii) the 2009 to 2021 general ledger and audited financial statements;

(iv) the 2022 audited reports and bank account statements of Ilham Tower Sdn Bhd, Ilham Baru and Yayasan Ilham; and

(v) loan agreement with Public Bank Berhad in relation to the construction of Ilham Tower.

The First Applicant's Case

[33] The first applicant took umbrage in the manner in which the MACC conducted the investigation against him and the remaining applicants. His reason is this. According to the first applicant, even if we were to assume for one moment that the investigation was to be based on a potential offence under s. 23 of the MACC Act, such an offence could only be committed, if at all, by an officer of a public body. Section 23(1) provides that an officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

[34] The first applicant asserted that he had held no office of a public body since 31 May 2001. In the circumstances, the first applicant contended that any alleged gratification could only have occurred prior thereto.

[35] According to the first applicant, what is perplexing is that the documents sought by the MACC's numerous statutory notices relating to the construction of Ilham Tower could not have been related to any gratification

offence. The first applicant asserted that the construction of Ilham Tower began in 2009 and was completed in 2015. It is for this reason that the first applicant believed that the MACC had ventured into a fishing expedition.

[36] In any event, the first applicant took a particular offence in a media statement issued by the MACC dated 30 December 2023. The media release, *inter alia,* states as follows:

(i) an investigation of the first applicant was initiated in February 2023 based on the information from the Pandora Papers.

(ii) the first applicant was being investigated under s. 23 of the MACC Act and s. 4(1) of the AMLA.

[37] The first applicant also asserted that having ownership of offshore companies and assets is not in itself an offence under either s. 23 of the MACC Act or s. 4(1) of the AMLA. In the circumstances, the first applicant insisted that it does not constitute "reasonable grounds" that justify the issuance of the notices under ss. 36(1), 38(1), 30(1), 33(1) of the MACC Act or s. 44 of the AMLA.

[38] In January 2024, the MACC officers arrived at the Ilham Tower seeking the production of documents relating to the acquisition of the Ilham Tower and Ilham Tower Land. Various statutory notices under the MACC Act were issued against the officers of Ilham Tower, Yayasan Ilham, Yayasan Haji Zainuddin, Ilham Tower Sdn Bhd and Ilham Gallery, a public art gallery located at Ilham Tower, to produce documents listed in the respective notices.

[39] The MACC also issued a notice pursuant to s. 30(1)(a) and (b) of the MACC Act to one Mok Yee Lee, the general manager of Element Hotel, located at Ilham Tower. In the said notice, the MACC required Encik Mok to provide details on the organisation and employee list at Element Hotel.

[40] On 3 January 2024, the MACC officers attended to the first applicant's previous residence at Taman Melawati armed with a search and seizure notice pursuant to s. 31(1)(a) of the MACC Act. The first applicant's complaint is that the MACC took away a huge number of documents belonging to him without providing a detailed index list.

[41] In addition, the MACC also issued notices pursuant to s. 30(1)(a) of the MACC Act and s. 44(1) of the AMLA to one Ahmad Fadzil bin Ahmad Mustafa. Ahmad Fadzil, who was the caretaker of the Melawati house, witnessed the seizing of documents. The first applicant's vehicles at the Melawati house were also "frozen" by the MACC.

[42] In short, the first applicant took exception to what he described as the continued "harassment" on the part of the MACC officers on him and the remaining applicants. The harassment, according to the first applicant,

smacks of political persecution. He cited an earlier media report attributed to Datuk Seri Anwar Ibrahim in July 2022. In the media report, Anwar Ibrahim was quoted as saying that the first applicant would have sleepless nights if he became Prime Minister.

The Application For Leave For Judicial Review

[43] Aggrieved by the actions of the putative respondents, the applicants commenced this application for leave for judicial review, seeking, *inter alia,* for a declaration that the putative first respondent and its officers have no reasonable cause to investigate the first to sixth applicants, which would lead to a prosecution for any offence either under the MACC Act or AMLA.

[44] The applicants also sought an order of *mandamus* against the putative first respondent and its officers that all documents seized or obtained from its investigation against the first applicant and his family members be returned to each of them within seven days from the order to be made in this judicial review application.

The Development Since The Filing Of The Application For Leave

[45] There has been a development since the filing of this application for leave.

[46] On 23 January 2024, the second applicant, Toh Puan Naimah, was charged before the Kuala Lumpur Sessions Court pursuant to s. 36(2) of the MACC Act for allegedly wilfully submitting on 13 December 2023 a sworn statement which was not in compliance with the terms of s. 36(1)(b) of the MACC Act.

[47] On 29 January 2024, the first applicant was charged before the Kuala Lumpur Sessions Court pursuant to s. 36(2) of the MACC Act for allegedly wilfully submitting on 13 December 2023 a sworn statement which was not in compliance with the terms of s. 36(1)(a) of the MACC Act.

[48] In view of this latest development, the applicants sought to amend their application for leave and the statement under O. 53 r. 3(2) of the Rules of Court 2012 ("ROC"). The application to amend, which is in encl. 16, was heard on 27 February 2024. This court has allowed the application in encl. 16 since the Attorney General has no objection to it.

[49] In the amended application for leave, the applicants seek for the following additional reliefs:

> 6A. An order of *Certiorari* against the Public Prosecutor and his agents, servants, officers or otherwise, to quash the charge made against the 2nd applicant on 23.1.2024.
>
> 6B. An Order of *Certiorari* against the Public Prosecutor and his agents, servants, officers or otherwise, to quash the charge made against the 1st applicant on 29.1.2024.

[50] Before me, learned counsel for the applicants attracted my attention to the judgment of the Federal Court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301. The Federal Court, in interpreting art. 5(1) of the Federal Constitution, held that a person's life or his or her personal liberty, in its widest sense, may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Article 5(1) provides that:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[51] Based on the said authority, learned counsel for the applicants submitted that the protection of "personal liberty" under art. 5(1) of the Federal Constitution must, therefore, demand speedy and fair investigations, part and parcel of the criminal procedure. Learned counsel then referred me to the judgment of the Supreme Court of India in *Vakil Prasad Singh v. State Of Bihar* [2009] INSC 156 SC. The Supreme Court, in interpreting art. 21 of the Indian Constitution, which is in *pari materia* with art. 5(1) of our Federal Constitution, held that the right to a speedy trial in all criminal prosecutions is an alienable right under art. 21 of the Constitution. The apex court in India further held that the right is not only applicable to the actual proceedings in court but also includes the preceding police investigation within its sweep.

[52] Learned counsel then submitted that there was a delayed investigation some 22 years after the first applicant left public office. According to learned counsel, the protracted investigations and seizures by MACC adversely affected the applicants.

[53] Secondly, while conceding that art. 145 of the Federal Constitution empowers the Public Prosecutor to institute or withdraw criminal charges, learned counsel for the applicants submitted that such power is not absolute. Learned counsel referred me to the judgment of the Federal Court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209. The Federal Court, *inter alia,* held that the Attorney General *qua* Public Prosecutor did not have absolute or unfettered discretion under art. 145(3) of the Federal Constitution to institute, conduct or discontinue any proceeding for a criminal offence. Such discretion, according to the Federal Court, was amenable to judicial review in appropriate, rare, and exceptional cases.

[54] Based on the proposition that can be distilled from *Sundra Rajoo*, learned counsel for the applicants then raised a very interesting point of law. It is this. According to learned counsel, it would follow that if the exercise of the Public Prosecutor's discretion to charge, prescribed in art. 145 of the Federal Constitution, is, under certain circumstances, amenable to judicial review, the same prosecutorial principles should be extended to statutory investigative powers.

[55] My attention was then drawn to the recent judgment of the Federal Court in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167; [2023] 3 MLJ 829. The Federal Court held that given the breadth and the constitutionally entrenched rights of judicial review available to the citizenry, both constitutional and administrative, it was not tenable to construe O. 53 of the ROC, a procedural rule, rigidly, and inflexibly so as to hinder or restrict the constitutionally sanctioned right of judicial review.

Analysis

[56] Let me begin by stating the law in respect of an application of leave for judicial review against investigative powers. The law can be traced in the judgment of the High Court in *City Growth Sdn Bhd & Anor v. The Government Of Malaysia* [2005] 7 CLJ 422; [2006] 1 MLJ 581. In that case, the applicants sought leave to commence judicial review under O. 53 r. 3 of the then Rules of the High Court 1980 ("RHC") for an order of *certiorari* to quash an order dated 5 July 2004 made by the Deputy Public Prosecutor and served on Hong Leong Bank Bhd and EON Bank Bhd ("the said orders"). The said orders purport to affect a seizure of, *inter alia*, movable property in the banking accounts of the applicants pursuant to s. 50(1) of the then Anti-Money Laundering Act 2001 ("the then AMLA"). The crucial question that needed determination was whether the said orders of the DPP, pursuant to s. 50(1) of the then AMLA were decision reviewable by way of judicial review.

[57] The High Court held that the order of the DPP is not reviewable under O. 53 of the RHC. Section 50(1) of the then AMLA is part and parcel of the investigation process into an offence under s. 4(1) of the same. In order to facilitate the investigation into the offence of money laundering, the law has provided the Public Prosecutor the power to assist the investigating officer.

[58] The proposition in *City Growth* was affirmed by the Federal Court in *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor* [2018] Supp MLJ 16. In that case, the enforcement officers from the Ministry of Domestic Trade and Consumer Affairs raided a factory of the appellant — a manufacturer of video compact discs — and seized machinery and equipment under the Optical Discs Act 2000 ("the ODA"). The appellant applied for judicial review for an order of *mandamus* to compel the second respondent to return the seized machines and equipment. The Federal Court, after having referred to *City Growth*, reiterated that such an exercise of power in the course of a criminal investigation was not open to judicial review under O. 53 of the ROC.

[59] More to the point to the facts of the instant case, the Federal Court in *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor* [2017] 10 CLJ 1; [2017] 5 MLJ 349 referred to both *City Growth* and *Empayar Canggih* held that the actions or decisions of a public authority, such as the MACC, in the exercise of its powers in the course of criminal investigation or enquiry were not open to judicial review. Abu Samah Nordin FCJ, in delivering the judgment of the apex court, referred to s. 30(1)(a) of the MACC Act and further held as follows:

> Therefore the answer to the question posed to this court is that the exercise of legitimate power, namely, the issuance of the notice pursuant to s. 30(1)(a) of the Act by the first appellant through the third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s. 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review.

[60] Despite the compelling authorities on the proposition that the exercise of powers in the course of criminal investigation is not amenable to judicial review, Tan Sri Tommy Thomas, in his usual persuasive self, invited me to conclude otherwise. Learned counsel for the applicants submitted that *Empayar Canggih* and *Latheefa Beebi Koya* must be viewed in the light of *Sundra Rajoo*.

[61] With respect, we need not even need to refer to *Sundra Rajoo*. The answer, I believe, can be found in *Latheefa Beebi Koya* itself. The Federal Court in *Latheefa Beebi Koya* indicated that one way to challenge the investigative powers is to establish *mala fide* or bad faith on the part of the investigation officers. However, Abu Samah Nordin FCJ held that, on the facts of the case, the respondents failed to establish that the notice pursuant to s. 30(1)(a) was issued *mala fide* or in bad faith.

[62] This is, of course, in line with the judgment of the Federal Court in *Sundra Rajoo*. There, the Federal Court held that while the Public Prosecutor's powers are reviewable, the exercise of discretion under art. 145(3) of the Federal Constitution, as a matter of policy, remains subject to a higher threshold of scrutiny.

[63] Tengku Maimun CJ, in delivering the judgment of the court, remarked that:

> In all challenges against the decisions of the AG/PP exercising his powers under art. 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling *prima facie* evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review.

[64] In the circumstances, even if we were to extend the *ratio* in *Sundra Rajoo* to the investigative powers, one must start with the connotation that such decisions are cloaked with the presumption of legality. Again, one must establish compelling *prima facie* evidence to challenge such decisions in a judicial review proceeding. A

[65] I have gone through the first applicant's affidavit in support of this application for leave in encl. 3 ("AIS3") with the proverbial toothcomb. Save for the assertion that he was perplexed and deeply disturbed with the conduct of the MACC, there was no allegation or even evidence, let alone compelling, to suggest any *mala fide* on the part of any of the investigation officers of the MACC in the conduct of the investigation against the applicants. The allegation of harassment, without more, does not in my considered view, amount to *mala fide*. B C

[66] As stated by the Federal Court in *Latheefa Beebi Koya*, mere suspicion or even an allegation of intimidation is insufficient. It might perhaps be open to the applicants to suggest that the circumstances surrounding the issuance of notices, the seizures of documents or even the freezing of the accounts might possibly relate to some suspicion of *mala fide*, but this cannot be taken for granted or considered sufficient proof by itself; see *Yeap Hock Seng v. Minister For Home Affairs, Malaysia & Ors* [1975] CLJU 207; [1975] 1 LNS 207; [1975] 2 MLJ 279. D E

[67] An allegation that the notices issued by the MACC are unlawful, *per se*, to my mind, is also insufficient to establish *mala fide*. Whether or not the issuance of notices is unlawful is a mooting point. It is a matter of interpretation. On this point, there is a respectable authority to the effect that the adoption of a different interpretation of law does not amount to an error of law on the face of the record and is therefore not the basis for judicial review; see *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398; [2004] 6 MLJ 53. F

[68] As to whether it was proper to commence an investigation on an allegation of an offence that occurred more than 20 years ago, I am of the respectful view that the maxim of *nullum tempus occurrit regi* applies. It simply means time does not run against the Crown. That the defence of the alleged offence is stale, so to speak, is unknown to our criminal law. If at all, as demonstrated in *PP v. Mark Koding* [1982] CLJU 96; [1982] 1 LNS 96; [1983] 1 MLJ 111, the contention that an offence is "stale" can only be argued as an extenuating circumstance during plea in mitigation upon conviction. G H

[69] In any event, even if the Anti-Corruption Act 1997 was repealed by the MACC Act, there is a saving clause in s. 74(3) of the MACC Act. Section 74(3) of the MACC Act provides as follows: I

A The provisions of this Act which relate solely to procedure or evidence shall apply to any offence against the law repealed under section 73 and such provisions may be used in the course of any pending investigations and in any court proceedings instituted before or after the commencement of this Act in respect of such offence.

B In *Ong Lock Mui v. Deputy Public Prosecutor* [1971] CLJU 97; [1971] 1 LNS 97; [1972] 1 MLJ 73, Syed Othman J held that the rule that the effect of repealing a legislation is to obliterate it completely applies only where there are no express saving provisions in the repealing legislation. In the instant case, s. 74 of the MACC Act is "the express saving provision in the repealing C legislation". In the circumstances, the argument that the investigation against the applicants offends art. 7(1) of the Federal Constitution on the protection against retrospective criminal laws is not applicable.

[70] On the allegation that the investigation against the applicants is politically motivated, I need only refer to the judgment of the Court of D Appeal in *Mohd Rafizi Ramli v. PP* [2014] 4 CLJ 1; [2014] 3 MLJ 114. In that case, the appellant was charged in the Sessions Court with an offence under s. 97(1) of the then Banking and Financial Institutions Act 1989 of having accessed and then revealing to the media details about the personal bank accounts of certain parties on the allegation that certain corrupt E practices relating to public funds in those accounts had been committed. Claiming the charge against him was *inter alia*, politically motivated, the appellant applied to the High Court to exercise its inherent jurisdiction, as well as its powers under s. 5 of the CPC to, *inter alia*, set aside the charge and acquit and discharge him. The High Court dismissed the application and the appellant appealed to the Court of Appeal.

F

[71] In affirming the High Court's judgment, the Court of Appeal held that there was no plausible reason for the High Court to interfere with the prosecution's duty in the criminal proceedings against him. However, it was further held that the appellant was not precluded from raising what he was G alleging in his application in his defence at the trial. The issue of *mala fide*, if there was one, was a question of fact which had to be proved by evidence at the trial.

[72] Applying the said proposition to the instant case, my considered view is that the allegation that the investigation against the applicant is politically H motivated or that Prime Minister Anwar Ibrahim considered the first applicant as "a political foe" should be addressed by the first applicant at the criminal trial.

On The Amended Reliefs

I **[73]** I now refer to the amended reliefs in paras. 6A and 6B sought by the applicants to quash the separate charges under s. 36(2) of the MACC Act.

[74] From the assertions made by the first applicant in AIS3, it is clear to me that the arguments centre on the substantive criminal process. In *Sundra Rajoo*, the learned Chief Justice, in delivering the judgment of the Federal Court, held that:

> Put another way, if the court is satisfied that the arguments centre around the substantive criminal process then the appropriate forum would be the criminal court and not any other court.

[75] By attempting to quash the charges against them by way of this application for leave for judicial review, the first and second applicants, in effect, are mounting a collateral attack. This is a judicial review court, and it should exercise great caution in allowing this collateral challenge. In *PP v. Dato' Sri Mohd Najib Hj Abd Razak* [2019] 6 CLJ 561; [2019] 4 MLJ 421, the Federal Court held that:

> The courts should exercise great caution in allowing other forms of collateral challenge, in parallel proceedings such as an application for a declaration or other form of judicial review with similar relief in the nature of *certiorari*, be it commenced in the same court or another civil or criminal court, which have the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial.

[76] In the circumstances, since the first and second applicants had already been charged at the Sessions Court, it is now open for them to challenge the same through a criminal application instead of a judicial review.

Findings

[77] For the reasons aforesaid, my findings are as follows:

(i) as a general rule, an exercise of power in the course of a criminal investigation is not open to judicial review under O. 53 of the ROC.

(ii) however, one way the applicants may challenge the criminal investigation is to establish the existence of *mala fide*; *Latheefa Beebi Koya*.

(iii) mere suspicion of *mala fide* or even an allegation of intimidation is insufficient.

(iv) on the facts as affirmed in AIS3, the applicants have failed to establish *mala fide* on the part of the investigation officers of MACC.

(v) as to the allegation that the notices issued by the MACC are unlawful, the adoption of a different interpretation of the law by the MACC does not amount to an error of law that is amenable to judicial review.

(vi) the assertion that the alleged offence is stale is not a defence known in our criminal law. The maxim *nullum tempus occurrit regi* applies.

(vii) in view of the saving clause in s. 74(3) of the MACC Act, art. 7(1) of the Federal Constitution does not apply.

(viii) likewise, in view of the facts available before the court, it is impossible for the court to impose a time limit required for the investigation. In any event, the first and second applicants were already charged before the Sessions Court, Kuala Lumpur.

(ix) the issue of the allegation that the investigation and eventual prosecution of the first and second applicants is actuated by political motives should be addressed at the criminal trial.

(x) the attempt to quash the prosecution of the first and second applicants at the Sessions Court should be made by way of a criminal application, not by way of a judicial review.

(xi) even if this court were to refer to *Sundra Rajoo* and extend the proposition to the investigation process, the two-step threshold for leave stated therein is higher than an ordinary application for leave.

(xii) the applicants have failed to establish with compelling evidence and *prima facie* proof that the decision or omission of the MACC's investigating officers falls within the traditional grounds of judicial review. In short, the threshold is not crossed.

[78] Since the applicants have failed to establish *mala fide*, this application for leave for judicial review must fail. The general position that the exercise of function in relation to criminal investigation is not amenable to judicial review, as stated in *Empayar Canggih* and *Latheefa Beebi Koya*, prevails.

[79] There is no arguable case disclosed in favour of granting the relief sought at the substantive hearing if leave is granted. The grant of leave under the circumstances would be an exercise in futility; see *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296.

[80] The application for leave is refused. In view of my finding, the relief sought in prayer B for an order of stay is equally refused.

[81] There shall be no order as to costs.